Lake Holiday Associates, Inc. d/b/a Lake Holiday Manor *and* 1199 Indiana, National Union of Hospital & Health Care Employees, AFL–CIO. Cases 25–CA–22091 25–CA–22253, 25–CA–22326, 25–CA–22353, 25–CA–22359, and 25–CA–22375

March 20, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On September 28, 1995, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, a brief in support of the judge's decision, and limited exceptions with a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The judge ordered that the Respondent reimburse the General Counsel for all litigation costs and attorneys' fees. He found that the Respondent's conduct was egregious, citing what he called the Respondent's many and pervasive violations of the Act, the Respondent's duplicity in the two settlement attempts which preceded the hearing, and the Respondent's delays in bargaining with the Union which was certified 7 years before the hearing. The judge cited *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

We agree with the judge's award of litigation costs and fees to the General Counsel.[4] However, we rely on the ''bad-faith'' exception to the American Rule which we discussed in *Frontier Hotel & Casino*, supra at 864.[5] As indicated there, the Supreme Court has sanctioned awards of attorney's fees where a party exhibits bad faith in actions leading to the lawsuit or in the conduct of the litigation. It is the latter that applies here.

The Board conducted an election on December 3, 1986, which the Union won, and the Union was certified on April 13, 1988. On July 14, 1989, on a Motion for Summary Judgment, the Board extended the certification year for 1 year, the extension to begin from the time the Respondent commenced to bargain in good faith.[6]

The Seventh Circuit Court of Appeals enforced the Board's bargaining Order against the Respondent on April 23, 1991.[7] Nevertheless, the Respondent engaged in multiple statutory violations, and the parties failed to negotiate a contract.[8] The Respondent's conduct resulted in a Board hearing on September 13, 1993. At that time, the General Counsel and the Respondent engaged in settlement negotiations. The tentative settlement required the Respondent to provide information to the General Counsel who would forward it to the judge for finalization of the settlement. The Respondent failed to meet the agreed-upon timetable for providing the information and the General Counsel was forced to move to ask for the reconvening of the hearing.

A full year later, on September 16, 1994, the judge approved a settlement between the Respondent and the General Counsel. However, the General Counsel was unable to secure the Respondent's compliance with this second agreed-upon settlement. The judge then withdrew his approval of the settlement and set the hearing for April 3, 1995.

Approximately 2 weeks before the hearing, on March 14, 1995, the Respondent's attorney sent a notice of withdrawal of appearance in the case, stating that the Respondent no longer wished to be represented by him. No party opposed the withdrawal of counsel, and on March 20 the judge issued an Order permitting

[1] In the absence of exceptions concerning the substantive violations of the Act found by the judge, we adopt them pro forma.

[2] We agree with the judge, for the reasons he gave, that it was proper to deny the Respondent's motion for a 60-day continuance and to proceed with the April 3, 1995 hearing despite the absence of the Respondent's counsel.

[3] We note that the judge made inadvertent errors in the Order and the notice. We will correct them. We shall also make modifications in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] The Union made no claim for its litigation costs.

[5] In its decision in *Unbelievable, Inc.*, supra, the D.C. Circuit found that the Board did not have the authority, under Sec. 10(c) of the Act, to order a respondent to pay litigation costs incurred by the charging party and the General Counsel. The Court stated, however, that it was not addressing the issue of whether, notwithstanding its lack of punitive authority, the Board might have the inherent power to control its own proceeding through an application of the bad-faith exception to the American Rule against awarding litigation expenses. 118 F.3d at 800 fn. *.

[6] *Lake Holiday Manor*, 295 NLRB 992, 993 (1989).

[7] *NLRB v. Lake Holiday Manor*, 930 F.2d 1231.

[8] The violations involve the following: (1) 8(a)(1) violations consisting of interrogations, solicitations of written statements, threats, and the maintenance and disparate enforcement of a facially invalid no distribution-no solicitation rule; (2) 8(a)(3) and 8(a)(4) violations consisting of discharges with refusal to reinstate or conversion to suspension; and (3) 8(a)(5) violations consisting of the unilateral elimination of an annual wage increase and a quarterly annual patient census bonus, the unilateral notification to employees of these unlawful changes, the unilateral implementation of a wage increase, direct dealing with employees with solicitations to resign and promises to rehire them at higher wage rates, and the adamant insistence on contract proposals, for the purpose of frustrating negotiations and preventing agreement.

withdrawal of counsel, ''providing that such withdrawal does not impact the scheduled hearing date of April 3, 1995.'' On Friday, March 31, the judge received a faxed motion from the Respondent's new attorney for a 60-day continuance of the hearing, because he had been contacted by the Respondent on March 28 and needed time to prepare the case. The judge denied this motion and indicated he would hold the hearing as scheduled.

The Respondent's president appeared at the hearing without counsel, and made an appearance on the record in order to make a statement concerning the denial of his right to counsel. He declined the opportunity to cross-examine the witnesses presented by the General Counsel.

We find that the Respondent evinced bad faith in the litigation of this proceeding. The Respondent moved toward settlement in September 1993, only to renege on fulfilling its responsibilities pursuant to the agreement, thereby precluding settlement. Then, a year later, in September 1994, the Respondent repeated its behavior. The Respondent agreed to a settlement which the judge approved. Nevertheless, the Respondent again refused to comply with this settlement, and the settlement was set aside. The Respondent refused to comply at this time solely on the basis of its opposition to certain ''boilerplate'' language in the remedial Notice to Employees which was to be posted, even though this language was identical to that agreed to a year earlier under the prior settlement, on which the Respondent had reneged for different reasons. The Respondent's capricious conduct once again prolonged the litigation in this case. Further, when the judge scheduled a hearing for April 3, 1995, the Respondent continued to engage in tactics designed to delay and frustrate the Board's processes.

In sum, this litigation could have been obviated had Respondent honored either of its settlement commitments. The result would have been prompt relief for the Charging Party, and lower litigation costs for the General Counsel. Unhappily, we cannot redress the former harm. But we can, and should, redress the latter.

We find that such repeated displays of bad faith warrant the judge's Order that the Respondent reimburse the General Counsel for litigation costs and attorneys' fees. Notwithstanding the fact that the Respondent reneged on fulfilling its responsibilities pursuant to both the 1993 and 1994 settlement agreement, we find that the Respondent's reimbursement obligation should commence on September 16, 1994. At that time the judge approved a second settlement which had been agreed to by the Respondent. This settlement had been carefully negotiated by the parties following the Respondent's objecting to the implementation of the September 1993 settlement agreement between the Respondent and the Union. Although the Respondent may arguably have had some legitimate basis for refusing to finalize arrangements under the September 1993 settlement, the Respondent's sole reason for reneging on the September 1994 settlement was that it objected to ''boilerplate'' language in the remedial notice. Significantly, it had approved such language in the 1993 settlement. Thus, its objections in 1994 would not appear to be genuine. Finally, the Respondent's attempt to delay the hearing at the last moment for a reason that it knew to be in conflict with prior instructions from the judge, and therefore predictably unacceptable, is further evidence that the Respondent's efforts were primarily directed simply at delay of the litigation. It is only the Respondent's bad faith that precluded the September 1994 settlement from being the consummation of this lengthy proceeding. The Respondent thus bears the responsibility for prolonging this case. Accordingly, it is appropriate the Respondent be directed to pay the General Counsel's litigation costs subsequent to September 16, 1994.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Lake Holiday Associates, Inc., d/b/a Lake Holiday Manor, Demotte, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union activities and sympathies and the union activity and sympathies of other employees.

(b) Soliciting written statements from its employees regarding their union membership, activities, and sympathies or the union membership activities and sympathies of other employees.

(c) Threatening its employees with discharge for refusing to give or alter written statements regarding the union membership, activities, and sympathies of other employees.

(d) Maintaining and selectively and disparately enforcing a no solicitation/distribution rule prohibiting solicitation or distribution at any time or place on facility property without permission from the facility administrator.

(e) Discharging its employees because they engage in union or other protected concerted activities or for cooperating with Board processes, or for refusing to assist it in its response to Board proceedings by failing and refusing to give or alter a written statement concerning the union activities of other employees.

(f) Failing and refusing to bargain in good faith within the meaning of Section 8(d) and 8(a)(5) and (1) of the Act with 1199 Indiana, National Union of Hospital & Health Care Employees, AFL–CIO.

(g) Unilaterally and without notice to or bargaining with the Union discontinuing the established practice of giving employees an annual wage increase.

(h) Unilaterally and without notice to or bargaining with the Union discontinuing the established practice of paying qualifying employees a quarterly patient census bonus.

(i) Unilaterally notifying its employees that it was immediately terminating its past practice of giving an annual wage increase and paying them a quarterly patient census bonus without notifying the Union and giving it an opportunity to bargain over this decision.

(j) Unilaterally and without notice to or bargaining with the Union implementing a wage increase for its unit employees.

(k) Dealing directly with its employees, and bypassing the Union, their exclusive collective-bargaining representative, by soliciting its employees resignations with promises to rehire them at a new higher wage rate.

(l) Adamantly insisting on contract proposals which are onerous and predictably unacceptable to the Union for the purpose of frustrating negotiations and preventing agreement.

(m) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Rescind the invalid no solicitation/no distribution rule including the unlawful modification of the rule, and make whole those employees, who suffered wage and/or other losses resulting from the unlawful enforcement of the invalid no solicitation/no distribution rule described in this decision as described in the remedy section of this decision.

(b) Within 14 days from the date of this Order, offer Edna Ramsey immediate, unconditional and full reinstatement to her former job, or if that job is no longer available, to a substantially equivalent one without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings, and any other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Make Mabel Broertjes whole for any loss of earnings, and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and suspension of Edna Ramsey and Mabel Broertjes and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(e) Rescind the notice to employees issued on July 17, 1992, regarding the suspension of annual wage increases and quarterly patient census bonuses for employees in the bargaining unit.

(f) Restore to employees in the bargaining unit, the wages, hours, and terms and conditions of employment which were in effect prior to May 3, 1991, including annual wage increases and quarterly patient census bonuses, except that any wage rates or other benefits which now exceed those in effect at that time shall not be reduced.

(g) Make whole those employees, who suffered wage and/or other losses resulting from the unlawful unilateral changes described in this decision as described in the remedy section of this decision.

(h) On request, recognize and bargain in good faith with 1199 Indiana, National Union of Hospital & Health Care Employees, AFL-CIO, as the exclusive representative of the employees in the unit described in the certification, concerning wages, hours, and terms and conditions of employment, including annual wage increases and quarterly patient census bonuses, and, if an understanding is reached, embody the understanding in a signed agreement.

(i) Extend the period of certification and recognition of the Union as the exclusive collective-bargaining representative of the unit employees for 12 months from the date that the Respondent commences bargaining in good faith, as if the initial year of certification had not expired.

(j) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facility in DeMotte, Indiana, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 3, 1992.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional attesting to steps that the Respondent has taken to comply.

(m) Pay to the General Counsel the costs and expenses incurred by him in the investigation, preparation, presentation, and conduct of this proceeding, since September 16, 1994, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees regarding their own Union and protected activities or such activities of other employees.

WE WILL NOT solicit written statements from our employees regarding their union memberships, activities and sympathies, or the union membership activities and sympathies of other employees.

WE WILL NOT threaten our employees with discharge if they decline to give and/or alter statements regarding the Union and protected, concerted activities of employees.

WE WILL NOT discharge or suspend our employees for engaging in union and protected, concerted activities or for cooperating with Board processes, or for refusing to assist us in our response to Board proceedings.

WE WILL NOT refuse to bargain with the Union by unilaterally discontinuing our practice of providing employees an annual wage increase and quarterly patient census bonuses, or by unilaterally instituting any changes in terms and conditions of employment in the absence of a good-faith impasse.

WE WILL NOT notify our employees of changes in their terms and conditions of employment without first bargaining in good faith with the Union.

WE WILL rescind the no solicitation/no distribution rule currently in our employee handbook and WE WILL NOT discriminatorily enforce any subsequent valid rules, and WE WILL make whole those employees who suffered wage and/or other losses resulting from our unlawful enforcement of the no-solicitation/no-distribution rule.

WE WILL, within 14 days from the date of the Board's Order, offer Edna Ramsey immediate and full reinstatement to her former job or, if that job no longer exists to a substantially equivalent position without prejudice to her seniority or other rights and privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings plus interest.

WE WILL make Mabel Broertjes whole for any loss of earnings and other benefits resulting from her discharge and its conversion to a 3-day suspension, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, notify Edna Ramsey and Mabel Broertjes in writing that we have removed from our files all references to the discharges and suspension previously issued to them, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and suspension will not be used against them in any way.

WE WILL recognize and bargain in good faith with 1199 Indiana, National Union of Hospital and Health Care Employees, AFL–CIO, including advance notification to that Union of any intent by us to change your terms and conditions of employment and by giving the Union an opportunity to bargain about any changes in terms and conditions of employment. The appropriate unit is:

> All service and maintenance employees at our DeMotte, Indiana facility; BUT EXCLUDING all office clerical employees, all licensed practical nurses, all professional employees and all guards and supervisors as defined in the Act.

WE WILL, on request, resume bargaining in good faith with the Union for 12 months thereafter as if the initial year of certification had not expired and WE WILL put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above-described bargaining unit.

WE WILL NOT attempt to circumvent the Union by engaging in direct dealing with our employees regard-

ing wages and other terms and conditions of employment.

WE WILL NOT bargain in bad faith with the Union by adamantly insisting on contract proposals which are onerous and predictably unacceptable to the Union for the purpose of frustrating negotiations and preventing agreement.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL withdraw the notice to employees issued by us on July 17, 1992, regarding the suspension of pay increases and bonuses for our employees.

WE WILL to the extent that we have not done so, restore our former practice of granting annual wage increases and quarterly patient census bonuses to our employees.

WE WILL bargain in good faith with the Union concerning future employee bonuses and wage increases, and with respect to all other terms and conditions of employment.

WE WILL make whole our employees for lost wages and bonuses which they suffered as a result of our discontinuance of annual wage increases and quarterly patient census bonuses, plus interest.

WE WILL restore to the employees in the bargaining unit the wages, hours, and terms and conditions of employment that were in effect before May 3, 1991, except that any wage rates or other benefits which now exceed those in effect at that time will not be reduced.

WE WILL pay to the General Counsel the costs and expenses incurred by him in the investigation, preparation, presentation, and conduct of this proceeding, since September 16, 1994, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding.

LAKE HOLIDAY ASSOCIATES, INC. D/B/A
LAKE HOLIDAY MANOR

Steve Robles, Esq., for the General Counsel.[1]
Keith R. Fafarman, Esq. (Gambs, Mucker, Bauman & Seegar), of Lafayette, Indiana, for the Respondent.
John Freeman, President, of Monticello, Indiana, for the Respondent.
Tiney L. Ross, Executive V.P., of Gary, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

I. THE CASE

Part A

ROBERT C. BATSON, Administrative Law Judge. This consolidated case initially came on for trial before me on September 13, 1993, at Rensselaer, Indiana. The charges in Case 25–CA–22091 were filed on August 3, 1992;[2] Case 25–CA–22253 on November 20; Case 25–CA–22326 on January 19, 1993; Case 25–CA–22353 on February 2, 1993; Case 25–CA–22359 on February 4, 1993; Case 25–CA–22375 on February 17, 1993. All charges were filed by 1199 Indiana, National Union of Hospital & Health Care Employees, AFL–CIO (the Union), and were timely served upon the Respondent. On April 30, 1993, the Regional Director for Region 25 (Indianapolis, Indiana) issued an order consolidating cases, consolidated complaint and notice of hearing, alleging that Lake Holiday Associates, Inc. d/b/a Lake Holiday Manor (the Respondent or Employer) had committed Acts in violation of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act).

Specifically the complaint alleges that Respondent coercively interrogated its employees with respect to their union activities and the union sympathies of other employees; solicited written statements from its employees regarding employees' union activities; threatened its employees with discharge if they refused to give and/or alter a written statement regarding their union activities; maintaining and selectively and disparately enforcing and applying an invalid and overly broad no-solicitation/distribution rule; altering the invalid rule to prohibit all solicitation and distribution throughout the facility without regard to work/nonwork areas and work and nonworktimes all in violation of Section 8(a)(1) of the Act. The violations of Section 8(a)(3) and (1) are the discharges of its employees Edna Ramsey and Mabel Broertjes. Broertjes was also discharged for refusing to give a sworn statement demanded and sought by the Respondent with respect to the charge in Case 25–CA–22253 in violation of Section 8(a)(4) and (1) of the Act.

The 8(a)(5) and (1) allegations arise out of the Union's certification as exclusive bargaining representative of the employees in an appropriate unit issued by the Board on April 13, 1988. On June 14, 1989, on Motion for Summary Judgment the certification year was extended for 1 year from the time Respondent commenced bargaining in good faith. That order was enforced by the United States Court of Appeals for the 7th Circuit on April 23, 1991.[3] These allegations include unilaterally discontinuing paying its employees annual wage increases; unilaterally discontinuing paying employees a quarterly patient census bonus; unilaterally altering its no solicitation/distribution rule; unilaterally establishing a new starting wage for unit employees; unilaterally implementing a new wage increase for starting employees; bypassing the Union and dealing directly with unit employees; adamantly insisting on onerous proposals which were predictably unac-

[1] Herein called the General Counsel.
[2] All dates are in are 1992 unless otherwise indicated.
[3] *NLRB v. Holiday Manor*, 930 F.2d 1231. (G.C. Exh. 4.)

ceptable to the Union; maintaining intransigent positions which frustrated the bargaining process, and general bad-faith bargaining.

The Respondent's answer to the complaint admits service of the charges and the complaint and that it discharged Edna Ramsey and Mabel Broertjes and the maintenance of the alleged invalid no-solicitation/distribution rule. It further admits unilaterally implementing the changes in terms and conditions of employment of its employees, but only after reaching a good-faith bargaining impasse. Respondent denies that it violated the Act in any manner as alleged in the complaint.

Having set forth the above statement of the case the usual decisional format is to set forth the findings of facts. However, there was no testimony or other evidence in support of the complaint taken at this September 13, 1993 session of the trial. At this point it will suffice to state that the complaint alleges, the answer admits, and the evidence establishes that these issues are properly within the Board's jurisdiction.

Part B. *Settlement of the Issues*

Upon my arrival at the trial site acquired by the counsel or the General Counsel shortly before the scheduled 1 p.m. hearing time, I was informed by the General Counsel, Steve Robles, Respondent's counsel, Keith Fafarman, and the Charging Party representative, Tiney Ross that the Charging Party and Respondent had been diligently striving ''all morning'' to reach a settlement. The parties jointly requested that I delay the opening of the record to permit them to further pursue settlement. I agreed to the request with the provision that we would open the record if settlement was achieved and read into the record the terms of the settlement agreement and at that time I would decide whether or not I would approve such agreement.

The General Counsel apprised me that while he would not join in the settlement agreement contemplated by the Union and the Respondent at that time, for reasons hereafter set forth, he was assisting them to formulate an agreement and would read the substance of an agreement, if reached, into the record. The parties were negotiating settlement from the preprepared settlement agreement and notice to employees which the General Counsel had provided which tracked all of the complaint allegations. The General Counsel and the parties agreed to report to me at 30-minute intervals any progress being made toward agreement. This they did. Finally at 4:45 p.m., according to the official transcript, the General Counsel advised that agreement had been reached and I opened the record in order for the substance of the agreement to be read into the record. This was done by the General Counsel.

The General Counsel offered into evidence as his exhibit 3, the settlement agreement and notice to employees, which was subsequently withdrawn inasmuch as it contained numerous handwritten changes and deletions and was basically not legible. The General Counsel was to subsequently substitute a ''clean'' copy. (Tr. 9–12.)

The General Counsel read into the record the terms of the Agreement which was labeled Appendix A. (Tr. 11L24–14L12.) I subsequently refused to let Respondent specifically deny the commission of any unfair labor practices. The settlement included payments of certain sums of money to the alleged discriminatees and other employees as compensation for discontinuation of the patient census bonus and annual wage increases. The General Counsel then read the language of most of the notice to employees the Employer had agreed to post. While this reading is not the complete notice as indicated from the context of the General Counsel's comments, Respondent's counsel had a copy of the notice and could have read along with him. (See Tr. 14–20.)

At this point the General Counsel stated his two objections to the settlement. The first objection was that the agreement did not name the individuals or the amount of money to which they were entitled as reimbursement for the discontinued patient census bonus and anniversary wage increases. (Tr. 20.) The Respondent had agreed to obtain the names and amounts, as the record indicates, at which time the General Counsel stated that when this was accomplished he would withdraw his first objection. (Tr. 21.) The General Counsel's second objection to the agreement was that it did not provide for the reinstatement of the patient census bonus. The General Counsel conceded that this was a minor part of the case, but for the record he had to object. The Respondent agreed to bargain with the Union in good faith about the reinstatement of the census bonus and to extend the certification period for one year from the time it commenced bargaining in good faith. (See Tr. 21–33.)

There followed a rather lengthy discussion about the patient census bonus and the General Counsel's objection to it. (See Tr. 35–54.) I gave the Respondent until October 15, 1993, to ascertain the names of the employees due moneys because of the discontinuation of the patient census bonus and the anniversary wage increase and to get agreement from the Union as to the accuracy and forward them to the General Counsel. The General Counsel would forward them to me by November 1, 1993, for my approval. (See Tr. 54–60.) I then adjourned *sine die*. (Tr. 61.)

Prior to adjournment I prophetically stated ''I am a little leery of this procedure. But I think the parties have substantial compliance in the settlement agreement, with the exception of the data reflecting how much all of the employees should receive.'' (Tr. 54.)

Part C. *Postadjournment Events*

Following the adjournment *sine die* of the hearing there ensued voluminous correspondence between Respondent's counsel Keith Fafarman and Union Representative Tiney Ross, endeavoring to resolve the issues.

Here I shall set forth a brief chronology of these events. On October 8, 1993, Fafarman wrote Ross a letter including computer-generated payrolls, stating in part ''those employees entitled to share in the $2,500 census bonus are indicated on the computer-generated payroll register.'' Also included were documents showing the identity of the employees and the amounts owed in settlement of the wage increase dispute. (Exh. A, G.C. Exh. 1(ii).)

Ross did not respond until by letter dated November 22, 1993, in which she took issue with some of Respondent's computation. She contended in substance that there were inadequacies in the payroll list of employees to be paid the wage increase among other objections to the Respondent's computations. She attached her own computer-generated list of employees and amounts owed and the reasons in support therefor. (Exh. B, G.C. Exh. 1(ii).)

By letter dated December 7, 1993, Fafarman responded stating that with one possible exception the amounts pre-

viously determined by Respondent were correct. He then set forth Respondent's reasoning for each individual Ross had questioned. There were 13 such individuals. (Exh. C, G.C. Exh 1(ii).)

Ross, apparently pursuant to a January 21, 1994 telephone conversation with Fafarman, responded on January 25, 1994, stating her perceived inadequacies of Respondent's December 7, 1993 computations. In essence she took issue with Respondent's change of everyone's anniversary date when a new Federal minimum wage took effect. She set forth several examples and stated that all other employees were in the same position. (Exh. D, G.C. Exh. 1(ii).)

On March 2, 1994, the General Counsel filed with me a Motion to Revoke Acceptance of Settlement Agreement and to Reconvene Hearing. (G.C. Exh. 1(gg)) In support of this motion the General Counsel set forth his objections to the settlement as indicated above. He continued:

> (4) The judge then directed the Respondent and Union to present such joint, agreed-upon information regarding names and money computations to General Counsel, who would then spot-check the data and who would only thereafter consider withdrawing his first objection under 2(a) above;
>
> (5) The Respondent and Union have attempted to agree on the specific identities and money amounts under 2(a) above, but have been unable to so agree, and appear to be at deadlock on those issues;
>
> (6) General Counsel therefore has no basis for withdrawing either of his two objections under (2) above;
>
> (7) Therefore the parties have not complied with the terms of the settlement agreement.

Wherefore, General Counsel moves that the judge issue an order (after allowing Respondent and the Union a reasonable period of time within which to respond to this motion) revoking acceptance of the settlement agreement and reconvening these cases for hearing in Rensselear, Indiana on agreed-upon dates.

On March 15, 1994, I issued an order to show cause why the General Counsel's motion should not be granted returnable by March 31, 1994. (JD Exh. 1.)[4] On March 25, 1994, the Respondent filed the following response to the Order: (G.C. Exh. (1ii).)

> Comes now Lake Holiday Associates, Inc. d/b/a Lake Holiday Manor (''Lake Holiday''), by counsel, and in response to the Order to Show Cause dated March 15, 1994, states as follows:
>
> 1. Lake Holiday and 1199 Indiana, National Union of Hospital and Health Care Employees, AFL–CIO (''Union'') are in agreement as to the specific employees who are entitled to equally share in the $2,500 ''census bonus'' that would be paid by Lake Holiday as part of the settlement agreement.
>
> 2. As of this date, Lake Holiday and the Union have been unable to agree on the amounts due employees as back wages in settlement of Lake Holiday's alleged discontinuance of an alleged established practice of anniversary wage increases.
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> 3. On October 8, 1993, Lake Holiday mailed to the Union its calculations of the amounts due employees under the proposed settlement terms of the wage increase dispute referenced in paragraph 2 above. A copy of this letter is attached as exhibit A.
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> 4. On November 22, 1993, the Union stated that they thought that Lake Holiday's calculation of back wages due under the proposed settlement was incorrect because certain employees did not receive back wages for all hours worked between March 17, 1992, and January 23, 1993. A copy of this letter is attached as exhibit B.
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> 5. On December 7, 1993, Lake Holiday responded to the Union's letter of November 22, 1993, and explained why its calculations of back wages due under the proposed settlement agreement were corrected. A copy of this letter is attached as exhibit C. As per paragraph 3 of this letter, it has been determined that Z. David worked 39.5 regular hours and 4.5 overtime hours between 1/17/93 and 1/23/93, and is thus due back wages of $6.94.
>
> 6. On January 25, 1994, the Union responded to Lake Holiday's letter of December 7, 1993. A copy of this letter is attached as exhibit D. As it is undisputed that Lake Holiday adjusted an employee's anniversary date for the purpose of annual salary reviews to the date an employee received a minimum wage salary increase, the Union is attempting to obtain back wages for hours that were not included in the proposed settlement agreement. Because the proposed settlement agreement did not provide for an across the board increase, the Union is in essence refusing to consummate the settlement agreement as negotiated by the parties.
>
> Respectfully submitted this 25 day of March, 1994.
>
> /s/ Keith R. Fafarman
> Keith R. Fafarman, of the firm of

By letter dated May 19, 1994, pursuant to a telephone conference call with all parties including myself, Fafarman wrote Ross setting forth that ''framework'' of Respondent's view of the settlement agreement. (JD Exh. 2.) On May 31, 1994, Ross responded with questions relevant to Fafarman's proposed framework. (JD Exh. 3.) On June 8, 1994, Fafarman wrote Ross that he believed the agreement could be finalized. (JD Exh. 4.)

It appearing that the Respondent and the Union were making little progress toward agreement, on August 3, 1994, I issued an Order Reconvening Hearing on September 12, 1994 at 1 p.m. at Rensselaer, Indiana, unless the parties submitted a completed settlement agreement to me prior to September 1, 1994. (JD Exh. 5.)

On August 11, 1994, Fafarman wrote Ross setting forth his recalculated amounts due employees for backpay under the settlement agreement. (JD Exh. 6) on August 22, 1994, pursuant to a telephone conversation with Ross, Fafarman wrote Ross that it appeared they were in agreement and that he would contact counsel for the General Counsel, Robles, as soon as possible to have the settlement finalized. (JD Exh. 7.)

[4] In the course of the hearing it was noted that the General Counsel had inadvertently failed to include a number of documents including some of my orders and correspondence between the parties as well as other data in the supplemental formal papers received into evidence. (I herewith admit those documents as JD Exhs. 1 through 16.

I was advised telephonically by the Counsel by the General Counsel that the Parties had reached agreement and on August 26, 1994, I issued an Order indefinitely postponing the hearing scheduled for September 12, 1994. JD Exh. 8. On August 31, 1994 the General Counsel faxed me a copy of the Settlement Agreement including the Notice to Employees, noting that Respondent had agreed to a one year extension of its bargaining obligation. In this agreement the General Counsel withdrew his first objection to the Settlement inasmuch as the parties had agreement on the identify of the employees and the amounts of money owed them. (JD Exh. 9.)

On September 16, 1994, I issued an order approving settlement agreement, dismissing complaint, and remanding case to Regional Director, for the purpose of overseeing compliance. (JD(ATL)–13–94, JD Exh. 10.)

Part D. *Postsettlement Events*

Evidently when Region 25 of the Board attempted to have the Respondent comply with the settlement agreement, it failed to do so. By letter dated October 7, 1994. (JD Exh. 11.) Fafarman advised me that the president of Respondent, John Freeman, had informed him that he was unwilling to sign and post the notice to employees because of the ''boilerplate'' language. The Notice contained the traditional Board approved language for such notices. Fafarman further suggested a conference call to see if the matter could be resolved. Such conference call was had on December 8, 1994, during which Fafarman wanted the language modified. The counsel for the General Counsel and the Charging Party strenuously objected, as did I after all the effort that had gone into the agreement. I advised Fafarman that I would immediately set aside the settlement agreement, and order dismissing the complaint and schedule a hearing at the earliest possible date. Fafarman then requested 30 days during which he would try to get his client to comply. I gave him until the close of business December 22, 1994, and asked the General Counsel to confirm that in writing. This he did on December 8, 1994, stating that the compromise money amounts agreed to in the settlement would be withdrawn and he would seek 100 percent with interest if the case went to trial. (JD Exh. 12.)

On December 22, 1994, Fafarman was contacted via re telephone his compliance and he stated he had not heard from his client. On December 23, 1994, I issued an order withdrawing approval of settlement agreement, rescinding order dismissing complaint and remand to Regional Director and order reconvening hearing. The hearing was ordered Reconvened for April 3, 1995.[5] (G.C. Exh. 1(JJ).)

On March 14, 1995, the following letter of withdrawal of appearance was sent by Fafarman:

NOTICE OF WITHDRAWAL OF APPEARANCE

> Comes now attorney Keith R. Fafarman of the law firm of Gambs, Mucker, Bauman & Seeger, and withdraws his and the law firm's appearance for Lake Holiday Associates, Inc. d/b/a Lake Holiday Manor for the reason that Lake Holiday Associates, Inc. no longer desires the above attorney or law firm to represent it in the above captioned matter.
>
> Respectfully submitted this 14th day of March, 1995.
>
> /s/ Keith R. Fafarman
> Keith R. Fafarman, of the firm of

No party opposed the withdrawal of counsel and on March 20, 1995, I issued an order permitting withdrawal of counsel ''PROVIDING such withdrawal DOES NOT IMPACT THE SCHEDULED HEARING DATE OF APRIL 3, 1995.'' (JD Exh. 13.)

Thereafter the Respondent made no contact with the Division of Judges or Region 25 with respect to representation. Region 25 administratively notified my office that as far as they knew John Freeman, president of Respondent would be representing Respondent. On Friday, March 31, 1995, at 3:58 p.m. my office received the following faxed motion for a 60-day continuance (JD Exh. 14):

> IN RE:
> CASES 25–CA–22091 et al.
> LAKE HOLIDAY ASSOCIATES, INC.
> d/b/a LAKE HOLIDAY MANOR
>
> MOTION FOR CONTINUANCE
>
> Comes now Daniel C. Blaney and petitions and advises the Court as follows:
>
> 1. That John Freeman of Lake Holiday Associates, Inc. d/b/a Lake Holiday Manor, contacted our Law Firm on Tuesday, March 28, 1995 and requested that we enter our appearance on his behalf in this matter.
> 2. That Daniel C. Blaney learned by subpoena to Sandra Smith that there is a hearing scheduled before this Court on April 3, 1995.
> 3. That Daniel C. Blaney as Attorney for Newton County, Indiana is required to be at a Newton County Commissioners meeting on said date.
> 4. That Daniel C. Blaney needs adequate time to prepare for the trial.
>
> WHEREFORE, John Freeman of Lake Holiday Associates, Inc. d/b/a Lake Holiday Manor, respectfullty [sic] requests that the trial scheduled for April 3, 1995 be continued for sixty days.
>
> /s/ Daniel C. Blaney
> Daniel C. Blaney
> Blaney, Casey & Walton
> 124 E. State Street
> P. O. Box 500
> Morocco, IN 47963

Mr. Blaney was telephonically advised by the associate chief judge that it was my intention to proceed with the trial and he could renew his motion at that time.

On September 18 Attorney Blaney filed, by fax, a motion to withdraw as counsel of record and requested that Respondent be granted 30 days in which to obtain other counsel. (JD Exh. 15.) On September 19, 1995, I issued an order granting the motion to withdraw as counsel and noted that Respondent could obtain counsel at any time. JD Exh. 16

II. THE RECONVENED HEARING

The trial in this matter, as had been scheduled by me reconvened on April 3, 1995, at Rensselear, Indiana. (G.C.

[5] This was the earliest date the General Counsel was available.

Exh. (JJ).) Respondent's president, John Freeman, appeared on behalf of Respondent. The issues to be litigated are set forth above in the part 1A section of this decision.

A brief outline of the events occurring with respect to the Settlement Agreement and Respondent's refusal to comply therewith was stated for the record. John Freeman, President of Respondent was present and initially declined an invitation to make an appearance on the record. Also present was Respondent's bookkeeper, Sandra Smith, who had been subpoenaed by the General Counsel. Also stated for the record were facts involving the withdrawal of Respondent's former counsel, Keith R. Fafarman, on the grounds that Respondent did not want him or his firm to continue to represent it. Further stated for the record was Respondent;, apparently, retaining Attorney Daniel C. Blaney, and the reasons for my refusal to grant a requested 60-day continuance of the case. (Tr. 68–70.)

After receipt of the supplemental formal papers offered by the General Counsel, John Freeman requested to make a statement. I then had him make an appearance for the record. (Tr. 71.) The dialogue with Freeman was:

> MR. FREEMAN: My name is John Freeman. My address is 410 Tioga Road, Monticello, Indiana.
>
> Uh, it is my opinion that I am being denied counsel in this matter, uh, which I also believe is my civil right to have counsel.
>
> My counsel could not be here because of a trial, I understand—I don't know what his schedule is.
>
> So I am not prepared to address, respond, ask, answer anything without the right of counsel.
>
> JUDGE BATSON: Well, Mr. Freeman, is it not correct, sir, that you were represented by counsel, Mr. Keith R. Fafarman of the law firm of Gambs, Mucker, Bauman and Seeger—
>
> MR. FREEMAN: Yes, I previously was.
>
> JUDGE BATSON—in the previous proceeding and that has been going on now for —well, the settlement agreement was approved more than 18 months ago and, uh, you refused to comply with that, is that correct, sir?
>
> Mr. Fafarman had entered into it, I assume, on your behalf?
>
> MR. FREEMAN: Without the advice of counsel, I am not prepared to address that question.
>
> JUDGE BATSON: Well, Mr. Freeman, what was your—you don't have to answer this if you don't want to, sir—I am certainly not going to take advantage of a layman in this regard.
>
> MR. FREEMAN: Thank you.
>
> JUDGE BATSON: And I have a great deal—as I say—of even empathy for Mr. Blaney because every lawyer who has been in private practice has had client to come to him two days before a trial which had been scheduled for three months was to occur and, ''I can get another 60-day postponement.''
>
> Now, according to Mr. Fafarman, he says that he has requested permission to withdraw because you no longer wanted him or his firm to represent them—to represent you in this matter, is that correct, sir?
>
> MR. FREEMAN: Without the advise of counsel, I am not prepared to address or answer the question.
>
> JUDGE BATSON: Well, did you no longer want Mr. Fafarman or his firm to represent you in this matter:
>
> I mean, that was Mr.—and he sent you a copy of the letter—that was his representation to me.
>
> MR. FREEMAN: Without the advise of counsel, I am not prepared to address or answer the question.
>
> JUDGE BATSON: Very well, do you have any idea whether or not Mr. Blaney will make an appearance today or tomorrow or at any point during these proceedings?
>
> MR. FREEMAN: I have no idea, Your Honor.
>
> I had a letter faxed to me that I received this morning and that is the only information I have.
>
> I am not talking—
>
> JUDGE BATSON: Is that letter the signed one that I have here that was faxed to my office on Friday afternoon at 3:58 to—
>
> MR. FREEMAN: Is it addressed to you?
>
> JUDGE BATSON: It is addressed to, uh—it just says, uh, ''In Re: Lake Holiday Associates, Inc., d/b/a Lake Holiday Manor, Motion for a Continuance.''
>
> I assume that it was faxed to me, yes.
>
> MR. FREEMAN: Right.
>
> No, that is not what I received this morning.
>
> JUDGE BATSON: Well, if you have—do you think what you received this morning might have some relevance to this matter?
>
> MR. FREEMAN: Other than he couldn't be here—that's the letter, yes, sir.
>
> JUDGE BATSON: I, sir—Mr. Freeman, I am extremely sorry in this matter but in my opinion, Lake Holiday Manor has engaged in laches, which is, you know, you don't act timely—in a timely fashion.
>
> It is a legal term and after awhile your time simply runs out. And, uh, that is actually what happened here.
>
> Now I will say this, Mr. Freeman, and I, uh—believe that the settlement agreement that was entered into on your behalf by Mr. Fafarman—well, it was actually sometime after September 13, 1993, because it took Mr. Fafarman approximately a year to give the General Counsel the identity of the employees to whom certain monies were owed and the amounts owed to them.
>
> And it was at that point that I approved the settlement agreement over the objection of Mr. Robles because I was giving you an extreme break.
>
> Now I realize you probably do not want to accept this—essentially the same settlement can go with the exception of the—if you will consent to the Board's issuing an Order and to the entry of a decree from the Seventh United States Circuit Court of Appeals' enforcing it.
>
> If I approve another settlement agreement, it is going to be one that I can enforce or that the Board can enforce and we will not get into the same bind as we did.
>
> I feel partially to blame for it but I had absolutely no reason to believe that, uh, once after the General Counsel—although he was not a party to it—he put in a lot of hours trying to put it together for Mr. Fafarman and Ms. Ross—and I had no reason to think that, uh, it would not be posted and executed.
>
> And it would all be over by now—everything.

> Essentially you can have the same settlement with the exception of you will have to re-institute the patient census bonus which I think is the objection that Mr. Robles has had to it.
>
> The Board will issue and Order you will consent to the entry of a decree from the Seventh Circuit Court of Appeals—
>
> MR. ROBLES: Your, Honor, I might add—
>
> JUDGE BATSON:—enforcing the Order.
>
> MR. ROBLES: I'm sorry. I might at this point in the deadline letter which I sent to the parties in December of '94, pursuant to your direction, uh, giving them I believe the deadline of December 22nd, to sign the extant settlement agreement, that I said if it wasn't signed by that time and if it wasn't received and approved by the Judge, then all of the money figures in the first settlement went out the window.
>
> They were all compromise figures and—
>
> JUDGE BATSON: That is correct.
>
> MR. ROBLES:—and we are not going to consider anything except 100 per cent—
>
> JUDGE BATSON: I will—we won't have the dollar figures in there, just reinstatement to and back pay of whatever it might be as determined by your compliance office.

Mr. Blaney was telephonically advised that I intended to go to trial on Monday, April 3, 1995, at Rensselear, Indiana, that his motion arrived too late. At the reconvened trial on April 3, 1995, John Freeman made an appearance on behalf of the Respondent. Daniel Blaney did not appear.

The General Counsel then stated his position and there was further dialogue by Freeman, the General Counsel, and myself.

All parties were afforded opportunity to call, examine and cross-examine witnesses, to introduce relevant documentary evidence, to make oral argument on the record, and to file posttrial briefs. The General Counsel filed a brief which has been duly considered. Based upon my observation of the witnesses, whose testimony was not refuted, and consideration of the probability of the veracity of their testimony I make the following

FINDINGS OF FACT

III. JURISDICTION

Lake Holiday Associates, Inc. d/b/a Lake Holiday Manor, is a corporation with an office and place of business located at Demotte, Indiana, where it is engaged in the provision of residential health care and related services. During the 12 months preceding issuance of this complaint Respondent derived revenues in excess of $50,000 from medical payments from the United States Government and during the same period of time derived gross revenues in excess of $100,000. The compliant alleges, the answer admits and the evidence establishes that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

The complaint alleges, the answer admits and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

IV. THE UNFAIR LABOR PRACTICES

The genesis of this case is a Board conducted election in December 9 1986, which the Union won. After the filing and processing of a test of certification charge, on April 13, 1988, the Board certified the Union in a unit of:

> All service and maintenance employees employed at our Demotte, Indiana facility; BUT EXCLUDING all office clerical employees, all Licensed Practical Nurses, all professional employees and all guards and supervisors as defined in the Act.

On July 14, 1989, the Board issued an order in Case 25–CA–19429, which provided inter alia for the extension of the certification period for 1 year from the time Respondent commenced bargaining in good faith. The Board sought enforcement of this order in the United States Court of Appeals for the Seventh Circuit. The court granted enforcement on April 23, 1991. (G.C. Exh. 4.) It was not until February 27, 1992, that the parties met at the bargaining table. The parties met 11 times between that date and January 22, 1993.

Many of the complaint allegations relate to and arises from the maintenance and enforcement of the following No Solicitation/Distribution rule which Respondent admits it had maintained at this facility since July 1, 1987:

> *2.28 GROUP II.*
>
> 14. Soliciting, collecting contributions or distribution of literature for any purpose within permission of the Administrator (is prohibited.)
>
> *4.7 SOLICITATION/DISTRIBUTION.*
>
> Your are not permitted to solicit other employees or to distribute literature during working time. Employees are not permitted at any time to solicit other employees in immediate resident care areas or in any other area where solicitation would interfere with resident care by disturbing residents or disrupting health care services.
>
> Working time includes the working time of both the person doing the solicitation or distribution and the person to whom it is directed.
>
> Employees are not permitted to distribute literature in any working area at any time.
>
> Persons not employed by the Manor may not, at any time, solicit, sell, or distribute merchandise, services, and/or literature on Manor property for any purposes.
>
> Any violation of this policy should be reported to your department director immediately. Employees violating this policy will be subject to disciplinary action up to and including termination.

The maintenance and enforcement of this rule is, on its face, clearly invalid and unlawful in that it is overly broad and particularly in that it requires the permission of the Administrator for any form of solicitation or distribution anywhere at anytime at Respondent's facility. See *Norris/O'Bannon*, 207 NLRB 1236 (1992).

The General Counsel's witness, Josephine Cain, a CNA who had worked for Respondent on two different occasion, from September 1991 to December 1992, and was reemployed in January 1995, and was working at Respondent at the time of the trial. Cain testified that in June or July 1992, she was approached by laundry employee Beth Saulsgiva

who asked her to come by the laundry room on her break and look at ''a paper.'' Cain forgot to do so. That same day as she preparing to clock out another employee, Jeanette Patrick, was coming in to work the evening shift showed her a piece of paper and asked her to sign it. The piece of paper was a petition to get the Union out at Respondent. Cain declined to sign stating she didn't know what she wanted to do. Cain testified that supervisory personnel was aware of the solicitation to decertify the Union.

Cain further testified that CNA Edna Ramsey showed her a classified advertisement which had been placed in an area newspaper by Lake Holiday manor stating ''NOW HIRING CERTIFIED NURSING ASSISTANTS.'' The ad went on to read ''ask about our exciting new wage scale'' (G.C. Exh. 7). Cain suggested that when Facility Administrator Rick Thornton got there they should talk to him and see if they were going to get a raise. Cain was designated spokesperson. When Thornton came in she asked ''Are we getting a raise hike?'' Thornton asked her to come into his office where he told her, ''No, you are not getting a raise.'' She reminded him that she had been there 15 months and was doing a good job. Thornton said, ''Well, you can't have a pay raise because of the Union. Mr. Freeman said the Union has put a stop to the raises.'' (Tr. 95.) Thornton then agreed with Cain that new employees would be paid more.

Cain further testified that about November 28, she and a group of other employees were at the nursing station when night-shift charge nurse Karen Etter told the group that Director of Nursing Mary Helms had told her to let the CNAs know that they could quit and come back and hire in at a higher rate of pay, but cautioned them not to do it as a group since that would be considered walking off the job, but to do it individually. This conversation occurred when Cain told them that Thornton had told her she couldn't get a raise because of the Union.

Cain identified a letter sent to all employees by Respondent dated July 17, 1992. General Counsel Exhibit 8 reads as follows:

> July 17, 1992
> Dear Lake Holiday Manor Employees:
>
> As you know, the management of this facility and the union are in the process of negotiating a contract.
>
> You are aware of the bonus system where, at the discretion of management, bonus checks may be given to employees who meet the cirteria. (sic)
>
> Because the giving of the ''bonus'' checks could be construed as a raise and thus against NLRB rules, we will not, unfortunately, be issuing ''bonus'' checks for the second quarter of 1992.
>
> Thank you for your understanding of this matter.
>
> Sincerely,
> /s/ Deborah L. Hartzler
> Deborah L. Hartzler
> Administrator

Karen Etter testified that she worked as night-shift charge nurse for Respondent from October 1992 to February 1993. She said one of the employees had shown her the advertisement (G.C. Exh. 7), in November or December. She further testified that approximately November 1992, Director of Nursing Mary Helms had a meeting with all the charge nurses in the small dining room at the facility. She testified that Helms referred to the ad (G.C. Exh. 7), and told them to tell the CNAs and assistants that they could quit and be rehired at a higher wage and to pass that word on to the people, but tell them not to do it at one time and leave the facility short handed. She added that Thornton had said they could not give them a wage increase if they already worked there because of the Union. She further admonished them not to say where they got this information. She stated that several employees did this. (Tr. 104–107.)

Edna Ramsey testified to having received General Counsel Exhibit 8 wherein Respondent stated they could not continue to give the census bonus as previously given because the NLRB could construe it as a raise, and indicated that was prohibited. Ramsey worked as a CNA at the facility from March 1990 to November 12, 1992, when she was discharged. She described the census bonus which had been given in the past. She testified that if the facility exceeded a certain percentage of its capacity during a given yearly quarter 25 to 30 employees would share in a $3 bonus. The stub of Ramsey's census bonus check dated October 19, 1991, in the amount of $125 was entered into evidence. (G.C. Exh. 5. She stated that she believed the percentage of capacity to be in the mid to upper 70 percent to qualify for the bonus.

Ramsey gave testimony with respect to Respondents past practice of granting a 10-cent-per-hour wage increase to all employees on the anniversary date of their employment. She testified that at a staff meeting in February 1992, owner and president, John Freeman informed the employees that because the Company was in negotiations with the Union the annual wage increase would not be given. She further testified that when the Federal minimum wage increase accrued in April 1991, all employees receiving an increase because of the minimum wage increase did not receive their anniversary date increase. The Respondent changed all such employees anniversary to April.

Ramsey, who is an alleged 8(a)(3) discriminatee, testified that on November 9, at about 4:15 p.m., after she had clocked out, she went to the break room to wait for her ride. Another CNA, Mabel Broertjes was having her lunch and they engaged in ''small talk for a few minutes. Ramsey then showed Mabel her ''application for the Union'' and asked if she had received one. Broertjes said she was not familiar with it and Ramsey gave her the card, saying she had others at home. Broertjes laid the card on the table. As Ramsey was leaving she passed Director of Nursing Mary Helms in the doorway. Helms glanced toward the table where Broertjes was having lunch.

Ramsey was scheduled off the following 2 days and returned to work on November 12. After a meeting in the dining room, which Ramsey did not attend, Mary Helms approached her and told her Administrator Thornton wanted to see her before she went home.

After clocking out Ramsey went to Thornton's office and present there with him was his secretary, Carol Craft. After asking her to be seated he stated ''Edna, . . . you have these warnings against you here but this last one, this fourth warning that I have today, I consider it very serious.'' He then read her the warning which constituted her discharge. (G.C. Exh. 6.) The discharge notice indicated four previous warnings but not the nature of them. Under remarks by su-

pervisor are inter alia ''Employees are not permitted to solicit or distribute literature in the facility (p. 25 employee handbook).'' Thornton asked if she would like to decline to sign. She did not sign.

With respect to Respondent's permitting solicitation and distribution of items not related to the Union, Ramsey testified that during her more than 2 years employment she had sold girl scout cookies at the facility and had observed others selling popcorn. She also related events involving raffles conducted by the activities director where employees could win a ''beautiful quilt'' displayed at the nurses station. Another employee, supervisor of housekeeping sold crafts made by her daughter. A former administrator, Dorothy Houston, sold handmade ornaments to the employees. She continued that kitchen supervisor, Trudy Perzee, sold cheese and Ramsey bought some. All these activities occurred during worktime.

Theresa Cross, a CNA at Respondent from November 1989 to August 1991, substantiated much of Ramsey's testimony regarding Respondent's permitting solicitation and distribution of non-union items. She testified that she took orders for what she called a ''Country peddler's gathering'' at the facility in the presence of supervision. She added that housekeeping Supervisor Eleanor Simonton took orders and sold handcrafted items at the facility. She testified to several other instances of solicitation in the presence of or by supervisors.

Mabel Broertjes was employed by Respondent as a junior aide PRN from August 1991 to January 18, 1993, at which time she was terminated but was recalled or rehired about January 21, 1993. Broertjes first identified (G.C. Exh. 25) which she received either by mail or with her paycheck. The letter set forth below states salary increases will not be given to bargaining unit employees:

> March 17, 1992
> Mrs. Deborah Hartlzer-Administrator
> Lake Holiday Manor
> 10325 County Line Road
> Demotte, IN 46310
> Dear Debbie,
>
> Our counsel has informed me that we must stop our discretionary salary increases given on anniversary dates for those employees who would be classified in a bargaining unit. Otherwise, this could be a violation under the NLRB rules.
>
> Effective today, give no raises to employees who would be in the bargaining unit. This does not apply to those outside the bargaining unit and this should continue until you have received written notification from me.
>
> Very truly yours,
> /s/John
> John K. Freeman
> President

With respect to Monday, November 9, Broertjes testified that she was scheduled to work at 2 p.m. She supported Ramsey's account of Ramsey's giving her an application to join the Union, at which time she asked how much union dues or initiation fees would be. Ramsey told her their raises would cover it. Broertjes later inquired at the nurses station as to how much initiation fees would be. A OMA, Barbara Hetrick, later asked her to let her borrow the card for a couple of days. She gave her the card.

Broertjes testified that on November 11, her day off, she received a telephone call from Facility Administrator Thornton. Thornton asked her if Ramsey had given her a union card. She replied yes. Thornton then hung up, but called back 15 or 20 minutes later and asked where Ramsey had given her the card and Broertjes replied at ''the time clock.'' On November 12, Broertjes was scheduled to work at 1:30 or 2 p.m. She located Ramsey in the small dining room and told her that Thornton had called her at home and asked about Ramsey's giving her the Union card. Ramsey told her they were not supposed to talk about the Union at work.

November 12, Thornton called Broertjes into his office and gave her a pen and paper and told her to write down what had happened when Ramsey gave her the card and to sign and date it. She did so saying she thought she had gotten it at the timeclock. Broertjes testified that she thought about it a lot and couldn't really remember where she was when Ramsey gave her the card. She talked with Ramsey who told that it was in the breakroom.

Later Broertjes went to Thornton and told him she really was not sure where Ramsey had given her the card. Thornton told her not to be influenced by anyone.

In early January 1993, Ramsey told Broertjes she should call the National Labor Relations Board and let them know of Thornton's talking to her.

On January 15, 1993, Broertjes was summoned to Thornton's office via the PA system. Upon arriving she found Thornton and Freeman present. Freeman showed her the statement she had signed about the card given her by Ramsey and said he understood she had doubts about it and she told him she did. Freeman then said, ''Well, we fired Edna based on this and it is going to cost $40,000, and I don't have the money. I am going to have to borrow it and you are not worth it.'' Broertjes replied that he shouldn't have fired Edna so fast. Freeman then looked at Thornton and said, ''If she can't give you a sworn statement Monday, you are to fire her.''

On Monday at about 11:15 a.m. Broertjes went to Thornton's office and told him that she ''couldn't give him that affidavit in all honesty'' Thornton said he was sorry. When she asked what reason he was going to give for firing her, he said he had been in a meeting all morning and hadn't had time to think about it. Later she called Director of Nursing Helms and told her she had been fired. Helms said she had just learned of it 15 minutes earlier.

On Thursday, January 21, Thornton left a message on Broertjes answering machine. When she returned his call he asked her to come back to work and told her they would pay her for the days she had been scheduled and that there would be no break in her service.

Broertjes testified that in August 1992 while in the laundry room she had been asked by Jeanette Patrick, while working, to sign a decertification petition so they could get their bonuses and raises reinstated. She testified to numerous sales and solicitation for nonunion related items on the premises during working time.

Following the enforcement of the Board's Order requiring the Respondent to bargain with the Union by the Seventh Circuit Court of Appeals, the parties had 11 bargaining ses-

sions between February 27, 1992, and January 22, 1993. Executive Vice President of the Local Union Tiney Ross headed the union negotiating committee, assisted by Local Vice President Lorenzo Crowell. Respondent's attorney, Keith R. Fafarman, and its owner and president, John Freeman, constituted the Respondent's negotiating team. Ross was present for all meetings except the June 18, 1992 meeting when the Union was represented by Local President Alice Bush.[6]

It is not necessary to set forth a detailed account of each of the 11 bargaining sessions. A brief outline of some will be sufficient. At the first session, February 27, 1992, all individuals indicated above were present. The Union presented its contracts proposal to the Employer. (G.C. Exh. 11.) Farfaman and Freeman glanced through it and stated they would get back to them after reviewing their ''policy book.'' It appears that a few unspecified questions were asked by Fafarman. The Respondent did not present a proposal at this meeting.

At the second meeting, March 18, 1992, the Respondent presented its first proposal. (G.C. Exh. 12.)[7] The Union had obtained the Respondent's ''Employee Handbook,'' pursuant to request, prior to commencement of negotiations. Ross strenuously objected to the ''Management Rights'' clause, set forth below, which essentially gutted the Union's ability to meaningfully represent the employees in essentially all areas. The Respondent's proposal offered only a 5 cents per hour annual wage increase, whereas Respondent's past practice had been an annual wage increase of 10 cents per hour. Other regressive proposals included an expansion of the probationary period for new employees from 6 months, as set forth in the employee handbook, to 1 year during which time an employee would have no effective union representation.

The Respondent's management-rights proposal which remained virtually uncharged throughout negotiation is so egregiously outrageous it is set forth in total with emphasis added:

> Subject only to the specific, express provisions of this Agreement, it is recognized and agreed that the management of the business and the direction of the working forces is vested exclusively and solely in the management of the facility. Any matter not specifically addressed by this Agreement, including but not limited to, *health benefits, bonus plans, initial rate of pay, job classifications and duties, promotions, employee misconduct, investigations, standard of employee workmanship*, and the facility operations, has been fully discussed by the facility and union and it is agreed that the facility's management will have the *sole right* and *total discretion* in deciding these matters. Any decision of the Facility to *institute, modify, or terminate health benefits or bonus plans* will not be discriminatorily applied within any job classification. This clause, however, does not preclude differential treatment between job classifications.'' [Emphasis added.]

Another outrageous and predictably unacceptable proposal by the Respondent is the grievance procedure. Step 2 of which is set forth with emphasis supplied.

> (step 2) ''A Conference will be held between the Facility Administrator, the aggrieved employee and/or his Union delegate and, in cases of suspensions exceeding two days or terminations, *the Union representative* . . . (The *grievance procedure does not apply* to) ''*non-selection for a promotion* when the basis for the grievance is the employee's allegation that he or she is better qualified than the person selected or to performance evaluations and position classifications.'' [Emphasis added.]

As will be discussed more fully below at the November 30, meeting the Respondent actually proposed to broaden the scope of nongrievable issues.

At the March 24, meeting the Union agreed to some minor proposals and there was further discussion about the management-rights clause and the probationary period. The Respondent refused to amend or change its position on either.

The April 14 meeting appears to have more or less paralleled the March 24 session. There was further discussion on management rights and the probationary period as well as the grievance procedure. The Respondent again refused to make any concessions with respect to those items and little if any agreement was reached.

The same was true at the May 6, meeting where ''union shop'' and dues ''check-off'' was discussed Freeman stated that if he gave the Union check-off he would have to charge them $2 per month, per employee for expenses. As in all the meetings the Respondent's management-rights proposal; grievance procedure and probationary period was discussed as were all other items mentioned above. The Respondent made no concessions. At this meeting the Respondent proposed that contrary to past practice when an employee took a ''sick day'' they had prove they had seen a doctor. Ross objected that a doctor's visit would cost $45 or $50 and all illnesses did not require one. The Respondent stood firm.

The subsequent meetings on May 18, June 18, August 12, September 25, October 30, and the final meeting on February 25, 1994, was in the same vein. There were some counterproposals by the Union which were largely rejected by Respondent.

At no time prior to April 1992, did the Respondent notify the Union over its discontinuation of the annual wage increase it simply unilaterally discontinued it when the Federal minimum wage increase became effective. Likewise prior to July 1992, the Respondent did not notify the Union and offer to bargain over its discontinuation of the patient census bonus which it had instituted in 1991. The General Counsel alleges another unilateral change Respondent made without notifying the Union and affording it an opportunity to bargain was a change in its already unlawful solicitation/ distribution rule when Respondent's stated reason for Ramsey's discharge includes the phrase ''Employees are not permitted to solicit or distribute literature in the facility.'' Adding that such was the facility policy. Throughout negotiations Respondent adamantly insisted upon the exclusive right to uni-

[6] It should be noted that the election in which the Union received a majority of valid votes was conducted in April 1988, and the circuit court's enforcement of the bargaining order issued April 23, 1991. Thus, it was almost 4 years after the election and a year after enforcement that Respondent came to the bargaining table.

[7] The proposal of the Respondent was given to the Union on March 18 1992, without the handwritten notations which were added by Ross as negotiations progressed.

laterally set the starting salary or wages for all new employees instead of negotiating a wage scheduled for them.

V. ANALYSIS AND CONCLUSIONS

The vast majority of the complaint allegations here do not turn upon credibility resolutions but are established by Respondent's own writings and documentary evidence generated by Respondent, i.e., the invalid no-solicitation/ distribution rule. Thus, in those matters Respondent was not prejudiced by its failure to timely obtain the services of a competent attorney to represent it at trial. Moreover, the witnesses who testified to matters that might have been denied did so in an extremely credible manner and did not exaggerate or otherwise embellish upon their testimony even though they were aware that Respondent, by Freeman, had stated that it would not call witnesses in its defense. Accordingly, I credit the General Counsel's witnesses, based not only upon their demeanor while testifying because much of the testimony was corroborated by other witnesses or documentary evidence.

I credit Broertjes, that Facility Administrator Thornton telephoned her at home and asked if employee Edna Ramsey had given her a union card, and later called back and asked where Ramsey had given her the card. I further find that Thornton obtained, by coercion, a written statement from Broertjes with respect to the event, thus establishing the violations alleged in paragraph 5(a)(i) and (ii). I further find in support of 5(b) of the complaint that Owner and President John Freeman instructed Administrator Thornton to discharge Broertjes if she refused to give or alter her written statement concerning where she had obtained the union card, and Thornton in fact did discharge her because she refused.

The Respondent admits the proclamation and maintenance of the no-solicitation/distribution rule alleged in paragraph 5(c) of the complaint. Respondent denies only that it was implemented on May 20, 1992, as alleged, but does not state when it was implemented. As noted above this rule is invalid on its face inasmuch as it requires permission from the administrator for solicitation or distribution on the premises among other invalid provisions.

The testimony of Cain, Etter, Ramsey, and Borertjes makes it abundantly clear and irrefutable that Respondent selectively and disparately enforced its invalid rule by permitting many types of solicitation and sales on working time and in work areas including solicitation of a decertification petition, but prohibited any type of prounion solicitation which establishes a violation of the Act as alleged in 5(d) of the complaint. Ramsey also establishes a violation as alleged in 5(e) by her discharge notice which states that solicitation anywhere in the facility is a violation of its no-solicitation/distribution rule and grounds for discharge.

The Respondent admits and documentary evidence establishes the Respondent discharged Ramsey and Broertjes for the reasons alleged in paragraphs 6(a) through (e) of the complaint.

Ramsey and Cain testified that prior to April 1, 1992, Respondent had an established practice of giving its employees an annual wage increase of 10 cents an hour. On April 1, 1992, when a new Federal minimum wage increase took effect all employees who received a raise as a result of that law unilaterally changed such employees anniversary date to April 1, and notified the employees that they were in negotiation with the Union and the NLRB prohibited such wage increase, which establishes the violation alleged in 8(b) of the complaint. Ross and Bush testified that at no time did Respondent advise the Union of its contemplated unilateral charge and provide it with an opportunity to bargain.

General Counsel Exhibit 8 and the testimony of Edna Ramsey establishes that Respondent unilaterally discontinued its past practice of giving employees a quarterly patient census bonus when its patient occupancy exceeded a given percentage of capacity. General Counsel's Exhibit 5 is a census bonus stub for Edna Ramsey. Ross and Bush testified that at no time did Respondent advise it of this action or offer to bargain about it. This establishes the violation alleged in 8(d) of the complaint.

By letter dated July 17, 1992 (G.C. Exh. 8), Respondent advised its employees that it was prohibited by the NLRB from giving employees in the bargaining unit pay raises as it had done in the past or continue with its patient census bonus since such could be construed as a wage increase. This is clearly erroneous in view of its past practice. This establishes the violations alleged in paragraphs 8(c) and (b) of the complaint.

The complaint allegations of paragraph 8(e) is essentially the same as 5(e) and has been established.

Paragraph 8(f) is established by the classified advertisement for new employees offering an ''exiting new wage scale.'' (G.C. Exh. 7.)

Paragraph 8(g) and (h) allegations have been proven by the testimony of Karen Etter and others that DON Mary Helms and Administrator Richard Thornton dealt directly with its employees, thus bypassing the Union, by urging them to resign and be rehired at a higher wage rate.

The government has established that Respondent violated the Act as alleged in paragraphs 8(I) through (m) as discussed above by maintaining an intransigent position with respect to its proposed management-rights proposal, its probationary period proposal as well as its grievance procedure proposal for the purpose of frustrating the negotiating process.

In view of the foregoing I make the following

CONCLUSIONS OF LAW

1. Lake Holiday Associates, Inc., d/b/a Lake Holiday Manor is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. 1199 Indiana, National Union of Hospital & Health Care Employees, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit is:

> All service and maintenance employees at our DeMotte, Indiana facility; BUT EXCLUDING all office clerical employees, all Licensed Practical Nurses, all professional employees and all guards and supervisors as defined in the Act.

4. At all times material in the Union has been, and is, the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By engaging in the following conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) By interrogating its employees about their union activities and sympathies and the union membership, activities, and sympathies of other employees.

(b) Soliciting a written statement from its employees regarding their union membership, activities, and sympathies or the union membership activities and sympathies of other employees.

(c) By threatening its employees with discharge if they refused to give or alter a written statement regarding the union membership activities and desires of other employees.

(d) By maintaining and selectively and disparately enforcing the following the facially invalid no-solicitation/distribution rule against employees who formed, joined, or assisted the Union while permitting other forms of solicitation and distribution including a decertification petition:

> *2.28 GROUP II.*
>
> 14. Soliciting, collecting contributions or distribution of literature for any purpose without permission of the Administrator (is prohibited).
>
> 4.7 *SOLICITATION/DISTRIBUTION.*
>
> You are not permitted to solicit other employees or to distribute literature during working time. Employees are not permitted at any time to solicit other employees in immediate resident care areas or in any other area where solicitation would interfere with resident care by disturbing residents or disrupting health care services.
>
> Working time includes the working time of both the person doing the solicitation or distribution and the person to whom it is directed.
>
> Employees are not permitted to distribute literature in any working area at any time.
>
> Persons not employed by the Manor may not, at any time, solicit, sell, or distribute merchandise, services, and/or literature on Manor property for any purpose.
>
> Any violation of this policy should be reported to your department director immediately. Employees violating this policy will be subject to disciplinary action up to and including termination.''

6. By engaging in the following conduct Respondent has violated Section 8(a)(3) and (1) of the Act.

(a) By discharging its employee Edna Ramsey and thereafter failing and refusing to reinstate her because of her union and protected concerted activities.

(b) By discharging its employee Mabel Broertjes and by suspenion reducing said discharge to 3 days.

7. By engaging in the following conduct Respondent has committed acts in violation of Section 8(a)(4) and (1) of the Act.

By discharging its employee Mable Broertjes because she failed and refused to give or alter a written statement concerning the union activities of another employee.

8. By engaging in the following conduct the Respondent has committed acts in violation of Section 8(a)(5) and (1) of the Act.

(a) Unilaterally and without notice to or bargaining with the Union discontinuing its established practice of giving its employees a yearly wage increase.

(b) Unilaterally and without notice to or bargaining with the Union discontinuing its established practice of paying its employees a quarterly patient census bonus.

(c) By unilaterally notifying its employees that it was immediately terminating its past practice of giving them an annual wage increase and paying them a patient census bonus without notifying the Union and giving it an opportunity to bargain over this decision.

(d) By unilaterally and without notice to or bargaining with the Union implementing a wage increase for its unit employees.

(e) By unilaterally and without notice to or bargaining with the Union implementing a wage increase for its unit employees.

(f) By dealing directly with its employees and bypassing he Union, their exclusive collective bargaining representative, Respondent solicited its employees resignations with promises to rehire them at a new higher wage rate.

(g) By adamantly insisting on contracts proposals which were onerous and predictably unacceptable to the Union for the purpose of frustrating negotiations and preventing agreement.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in numerous violations of Section 8(a)(1), (3), (4), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include recission of all adverse unilateral changes found herein, return to the status quo ante, immediate and unconditional reinstatement of Edna Ramsey to her former job or if that job is no longer available to at substantially equivalent one, making her whole for any losses of wages on benefits she may have suffered by reason of the discrimination against her. Mable Broertjes having been reinstated and made whole. Make whole all employees who were unlawfully denied their annual pay increases and any losses sustained by reason of the discontinuation of the patient census bonus. All make whole losses shall include interest and be computed on a quarterly basis from the date of such losses less any net interim earnings as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Additional affirmative action shall also require Respondent, upon request, to bargain in good faith with 1199 Indiana, National Union of Hospital & Health Care Workers, in the appropriate bargaining unit and if agreement is reached reduce any agreement to writing and sign it. Given the flagrant breath and scope of Respondent's 8(a)(5) violations found herein is shall be ordered to bargain in good with the Union for at least one year from the time it commences bargaining in good faith. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Respondent shall be furthered ordered to remove from the personnel files of Ramsey and Broertjes any references to their discharges and promise them that their discharges shall not be used against them in any manner.

Finally, because Respondent has demonstrated its rejection of the good-faith bargaining obligation imposed upon it by the Act and because it has engaged in artifice to avoid its

fundamental obligation under the Act, a broad cease and desist order is appropriate. *Hickmott Foods*, 242 NLRB 1357 (1979).

In his posttrial brief the General Counsel seeks a finding that the Respondent be ordered to pay attorneys' fees and costs to the General Counsel. As grounds therefore he asserts the multiplicity of violations of the Act; the egregious and pervasive nature of Respondent's conduct; the duplicitous actions of Respondent in misleading the judge and the parties regarding settlement efforts and intentions, and the contumacious delays and laches in which the Respondent has engaged since it was first ordered to bargain in good faith with the Union pursuant to certification and enforcement thereof.

The General Counsel argues that Respondent's flagrant, egregious, duplicitous, and contumacious conduct here is well within the narrow parameters for such award set forth by the Supreme Court in *Summit Valley Industries v. Carpenters Local 112*, 456 U.S. 717 (1982). In a recent case, *Frontier Hotel & Casino*, 318 NLRB 857 (1995), the Board extensively discussed and analyzed the circumstances under which the General Counsel and Unions may be reimbursed by a Respondent for litigation costs. It further analyzed and reconciled the American Rule as applied by the Federal courts in *Summit Valley*.

Under the guidance given by the Board in *Frontier Hotel & Casino*, I find the Respondent's conduct here to have been so outrageous, flagrant, egregious, and contunaminous to warrant an order that Respondent reimburse the General Counsel for all litigation costs and attorney's fees. Such costs and expenses to be determined at the compliance state of this proceeding.

[Recommended Order omitted from publication.]